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No. 76

In the Supreme Court of the United States

STATE OF LOUISIANA,

Respondent,

VERSUS

PHILIP CARDINALE, JR.,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

LEANDER H. PEREZ, JR.,
District Attorney.

PRESTON H. HUFFT,
Special Counsel to District Attorney.

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Philip Cardinale, Jr. was charged in an indictment with having murdered one Mary Agnes Buford. Following a trial by jury he was sentenced to death. An appeal was lodged with the Supreme Court of the State of Louisiana and by a decree dated January 15, 1968 the conviction was upheld. On February 19, 1968 the State Supreme Court denied the application for a rehearing and the defendant filed this application for a Writ of Certiorari.

ISSUES

The petition for a Writ is based on the use in the trial of the entire confession which the defendant gave to police officers in Tuscon, Arizona, to which state he had fled after the commission of the crime. While walking on the streets of Tuscon, the defendant flagged a police car and asked to be taken in. Before conversing with him both police officers warned him that he

did not have to say anything; that anything he said could be used against him and that he had the right to contact an attorney. The conversation with the defendant was informal and under no duress, pressure, threats or promises whatsoever—the defendant was eager and anxious to converse so as to get it off his chest. He was talking to police officers who, at the time of commencing the conversation, did not even know what if any charges were pending against the defendant in the State of Louisiana.

No question has ever been raised at any stage of the proceedings as to the voluntary nature of the confession but objection was made originally to the fact that the defendant was not offered the services of an attorney. The State Supreme Court rightfully disposed of this issue in the following language:

> "Bills of exceptions Nos. 7 and 9 were taken to the introduction of an inculpatory statement (or confession) of the accused made to law enforcement officers of Tuscon, Arizona. There is no contention whatsoever that the statement was not completely voluntary, and the evidence itself shows quite the contrary. *The accused voluntarily sought out and surrendered himself to the Tuscon police officers,* who at such time had no knowledge of the instant crime or that the defendant was wanted as a fugitive; he told them he was probably wanted in Louisiana in connection with the crime; and, after being advised of his right of counsel, *he freely recited the facts to which the officers from Tuscon testified.*

In view of these circumstances, which are not

disputed, the guidelines set down in *Escobedo v. Illinois*, 378 U.S. 490, L2L. Ed. 2d. 977, are not applicable. See also *State v. Cleveland and Morris Johnson, supra*, and *State v. Aherns*, 250 La. 391, 196 So. 2d. 250.

The sole basis for the objection to the statement is that the accused was not *offered* the services of an attorney as required by the decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2D. 694. But inasmuch as the trial of this defendant commenced on May 2, 1966, prior to the effective date of the Miranda case (which was June 13, 1966), the decision therin is not applicable. See *Johnson v. State of New Jersey*, 384 U.S. 719, 16L. Ed. 2D. 882, *State v. Evans*, 249 La. 861, 192 So. 2d. 103, *State v. Gregoire*, 249 La. 890, 192 So. 2d. 114, *State v. Cleveland and Morris Johnson, supra* and *State v. Aherns, supra.*

Moreover, the circumstances recited above of the giving of the statement in the instant case, we think, take it out of the rule laid down in Miranda. Therein the United States Supreme Court prefaced its holding by pointing out that its guidelines were to apply to statements "stemming from custodial interrogation" of the defendant, and that "By custodial interrogations, we mean *questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action* * * *." And it concluded its discussion with the following observation: "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any

compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. *There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" (Underscoring theirs)

State v. Cardinale, 251 La 827, 206 So (2d) 510 (1968) Page 839,840,841.

This issue has been abandoned by the defendant and he relies in his application for a writ solely on the basis of the admissibility of the entire confession. When the police officer from Tuscon, Arizona took the stand he testified as to the entire confession received from the defendant. Included in the confession was statements by the defendant that he had been convicted several months before of a crime involving a girl, that he was sentenced to 90 days imprisonment in the Parish jail, that he did his time in 45 days and that upon being released from jail he had secured a gun and had spent 3 or 4 nights looking for the girl to kill her.

The defendant objected to the testimony of the police officer relative to the previous offense and the incomplete offense of seeking out the prosecutrix to kill her but the Trial Judge overruled the objection and

the entire confession was introduced in evidence. In arriving at his decision the Trial Judge relied on the Louisiana Revised Statutes—Title 15: Section 450 which provides as follows:

> LOUISIANA REVISED STATUTES—TITLE 15: SECTION 450 "USE OF CONFESSION, ADMISSION OR DECLARATION IN ENTIRETY"
>
> Every confession, admission or declaration sought to be used against anyone must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

In its decision the Louisiana Supreme Court upheld the lower court in the following language:

> "Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tuscon police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made refernece to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.
>
> We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's

statement outlining to the officers his participation in the instant crime.

The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d. 473. Therein we referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." And we held: "The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of hereoin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution."

The Maney holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d. 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d. 34.

State v. Cardinale, 251 La. 827, 296 So. (2d) 510 (1968) Page 842, 843.

Defendant's petition for a writ in effect contends that the provisions of LRS 15: 450 are unconstitutional in that they violate the Fourteenth Amendment. In support of this he relies on the dissenting opinion in *Spencer v. State of Texas*, 385 U.S. 560, 87 S. Ct. 648 (1967). However a review of the majority opinion in the *Spencer* case fails to disclose any basis whatsoever for declaring LRS 15:450 to be violative of the constitution. In *Spencer* this Court upheld the recidivist statute of the State of Texas. The following language in *Spencer* is most applicable to the matter presently before the Court:

> "and held that his Court was not the best forum for developing rules of evidence, and would, therefore, not proscribe the long-standing practice at issue. A fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts, see *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S. Ct. 1523, 16 L.Ed. 629, but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts." Page 653
>
> * * *
>
> "Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749; *Betts v. Brady*, 316 U.S. 455, 625 Ct. 1252, 86 L. Ed. 1595; cf. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2D. 799; see *Estes v. State of*

Texas, 381 U.S. 532, 85 S.Ct. 1628, 14L. Ed. 2d 543; *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed 2D 600; cf. *Griffin v. People of State of Illinois* 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891. *But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority.*" * * * As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar." *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105, 545 Ct. 330, 332, 78L Ed. 674. See also *Bachalter v. People of State of New York*, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed. 1492. Pages 653, 654 (Emphasis ours).

Further commenting on its inability to consider the matter before it in the Spencer case in a legislative or rule-making context, this Court had the following to say:

> "To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustified encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution which these rules are not." Page 656

The foregoing clear and strong language cannot

in any way be construed in support of defendant's contention in the matter.

The defendant would have this Court take unto itself the legislative and rule-making power by rewriting the provisions of LRS 15:450 to suit what the defendant believes the statute should contain. In emphatic language in the *Spencer* case this Court has declared that it will take no such powers unto itself.

LRS 15:450 has been on the statute books of the State of Louisiana for over 40 years and has consistently been followed by the jurisprudence in this State. An examination of the very wording of the statute—the entire confession must be admitted so that the defendant may be afforded the benefit of any exculpation or explanation that the whole statement may afford—can lead to no other conclusion but that this statute falls clearly within the fairness provisions of the Fourteenth Amendment. This rule applies to every confession and no prosecutor is granted the opportunity to determine what parts of a confession he will or will not present for the consideration of the jury. He is bound by this rule to present the entire confession and the jury will have the opportunity to examine and give full weight and consideration to the entire comments of the defendant including any exculpation and explanation that may be contained therein. Through such a system the defendant is assured that the jury will receive his confession in the same way in which it was given by him. This statute is a rule of evidence in the Louisiana judicial system, has been for

many years and plays an important role in the fair conduct of all trials.

It is submitted that LRS 15:450 is not violative of the Fourteenth Amendment and the decisions of the Lower Court and the State Supreme Court applying the provisions of LRS 15:450 should be upheld.

The defendant in his petition makes note also of the argument which was advanced in the Louisiana Courts by the District Attorney that the reference to the prior conviction for a crime against a girl and the subsequent search for her upon being released from jail with the avowed purpose of killing her would also have been admissible under the provisions of LRS 15:445 and 446. This is certainly true and it is the position of the State that even without the provisions of LRS 15:450 or if these incidents were not the subject of a confession they would have been admissible to show intent as intent was a necessary ingredient of the crime that the accused stood charged of: Murder under LRS 14:30. LRS 15:445 and 446 provide as follows:

> SECTION 445 INFERENCE OF INTENT; EVIDENCE OF ACTS SIMILAR TO THAT CHARGED
>
> In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction."
>
> SECTION 446 EVIDENCE WHERE KNOWL-

EDGE OR INTENT IS MATERIAL AND WHERE OFFENSE IS ONE OF A SYSTEM

When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent but not to prove the offense charged."

In support of this we find the following:

"Evidence of other crimes similar to that charged is relevant and admissible when it shows or tends to show a particular criminal intent, which is necessary to constitute the crime charged. Any fact which proves or tends to disprove the particular intent is competent, and cannot be excluded because it incidentally proves an independent crime.

This court has recognized the principle that where the element of intent is regarded as an essential ingredient of the crime charged it is proper to admit proof of similar but disconnected crimes to show the intent with which the act charged was committed." *State v. Cupit*, 189 La. 509, 179 So. 837, 838 (1938).

To the same effect we find the following in *State v. Evans* 249 La 861, 192 So (2d) 103 (1966):

"These bills were taken to the Court's permitting two witnesses, Glenda Dale Jenkins and Clyde Coombs, to testify as to the commission by these defendants of a prior armed robbery of

another bus operator at a location in the vicinity of the instant shooting, and to *their attempted* armed robberies of several places of business in the general locale of defendant's residences.

"Generally evidence of other crimes, even those similar in nature, is not admissible to prove the offense charged. However, there are well recognized exceptions to this rule, one being that such evidence is admissible to prove intent when it is a necessary ingredient of the crime charged." Page 106

See also *State v. Johnson*, 228 La. 317, 82 So (2d) 24 (1955) and *State v. Morris*, 245 La 475, 157 So (2d) 728 (1963). In the Morris Case the Court held that on the trial of the defendant for Murder under 14:30 it was admissible for a police officer to testify that the defendant some years before had pleaded guilty without capital punishment to killing another person. This testimony was admissible because intent was a necessary ingredient of the crime of murder.

The State Supreme Court did not go into the second point raised above as a confession was involved and the matter was controlled by LRS 14:450. There was no necessity to discuss other aspects of the admissibility of such evidence.

It is respectfully submitted that this application for Writ of Certiorari be denied as the holding of the State Supreme Court that the entire confession must be introduced in evidence under LRS 15:450 is not violative of the Fourteenth Amendment and is in keep-

ing with the reasoning of this Court in the *Spencer* case.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

LEANDER H. PEREZ, JR.,
District Attorney.

PRESTON H. HUFFT,
Special Counsel to District Attorney.

CERTIFICATE

I, William P. Schuler, a member of the bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing opposition to petition for writ of certiorari has been mailed to counsel of record, Nathan Greenberg, Esq., 848 Second Street, Gretna, Louisiana by postage prepaid.

William P. Schuler

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